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No. ....

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

JAMES HENRY PATTERSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Appeal from the United States Court of Appeals for the Ninth Circuit

Petition for Certiorari--Criminal Case

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Question Presented

Did the trial court commit reversible error in admitting the Grand Jury testimony of James McKay without a showing that at the time he testified the subject matter was fresh in his mind or accurately reflected the witness' knowledge?

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Petition for Certiorari--Criminal Case

Petitioner, James Henry Patterson, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered on June 2, 1982, as modified upon denial of a petition for rehearing on July 16, 1982, affirming the conviction of James Henry Patterson

for two counts of receiving stolen property in violation of Title 18 U.S.C. 2313.

Opinion Below

The opinion of the United States Court of Appeals for the Ninth Circuit, dated June 2, 1982, affirming in part the judgment of guilt in United States of America, Plaintiff-Appellee v. James Henry Patterson, Defendant-Appellant, No. 81-1211, appears as Appendix A of this petition and is reported at 678 F.2d 774. The order of July 16, 1982, denying the petition for rehearing and modifying the opinion appears as Appendix B of this petition.

Jurisdiction

This Honorable Court has jurisdiction to review the judgment in

question by writ of certiorari as is provided by 28 U.S.C. 1254(1).

Federal Statutory Provision Involved

The case involves interpretation of Federal Rules of Evidence, Rule 803(5), which provides:

> (5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

Statement of the Case

On May 5, 1980, an indictment was filed in the United States District for the District of Nevada charging

petitioner and two co-defendants with receiving stolen property in violation of 18 U.S.C. 2313, and conspiracy to transport stolen property in violation of 18 U.S.C. 2312.

On May 13, 1980, petitioner was arraigned and pleaded not guilty. Trial by jury commenced on July 22, 1980, before The Honorable Edward C. Reed, Judge. On July 29, 1980, petitioner was found guilty of two counts of violation of 18 U.S.C. 2313 and of one count of conspiracy in violation of 18 U.S.C. 2312. His two co-defendants, Heidinger and Austin, were acquitted on all counts. On September 5, 1980, the court sentenced petitioner to four years on each count, to run concurrently with each other. Petitioner was admitted to bail pending

appeal on September 4, 1980. On February 23, 1981, petitioner's motion for new trial was denied.

Petitioner's notice of appeal was filed on February 23, 1981. On June 2, 1982, the U.S. Court of Appeals for the Ninth Circuit affirmed petitioner's conviction for violating 18 U.S.C 2313 and reversed the conviction for violating 18 U.S.C. 2312. (United States v. Patterson, 678 F.2d 774 (9th Cir. 1982)). On July 16, 1982, the Court of Appeals denied a petition for rehearing and made certain modifications in its opinion.

Facts Relating to the Offense

Petitioner is a building contractor in the Reno, Nevada,area, who at the time of the events in questions was engaged in building a large tract of

low-cost homes in Desert Springs. He employed several subcontractors and a large amount of construction equipment.

In 1979 and 1980, an investigation by local and Federal authorities determined that several forklifts, including the two involved in the indictment, had been stolen in California. Petitioner advised the authorities, and later testified at trial, that he had bought them and obtained bills of sale for them. He had replaced the ignition and cut the gas cap lock on one of the forklifts because the keys were missing, and he had cut off the side panels from one to prevent overheating. Petitioner denied any knowledge that the forklifts had been stolen.

At trial, one James McKay,

petitioner's nephew, was called by the Government and testified that, while working for petitioner in 1979, he had helped him cut the locks and side panels off certain forklifts. He testified that he did not remember petitioner telling him where he got the forklifts. After examination of his Grand Jury testimony failed to refresh McKay's recollection, the court, over objection, admitted a portion of McKay's Grand Jury testimony in which he had said that petitioner had told McKay that the forklifts were "hot".

Reasons for Granting the Writ

The United States Court of Appeals for the Ninth Circuit has rendered a decision in this action which appears to be in conflict with decisions of

a United States Court of Appeals decision for the Seventh Circuit. Further, this court's decision herein has departed from the accepted and usual course of judicial proceedings in that admission of certain crucial testimony was erroneous.

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Argument

THE ADMISSION OF THE GRAND JURY TESTIMONY OF JAMES McKAY IN EVIDENCE AT TRIAL WAS REVERSIBLE ERROR

James McKay, a key witness for the government, testified that he was a relative and employee of defendant James Patterson at the Desert Springs job site where he worked for defendant until the end of the summer of 1979. (RT 61-64).[1/] He testified to an incident during his employment in which he, in the company of defendant, cut some locks and removed side panels from two forklifts. (RT 66-73). In response to a question from the prosecutor as to whether defendant told

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1/ RT refers to Reporter's Transcript of trial testimony appended hereto verbatim as Appendix C.

told McKay where he obtained the forklifts, McKay testified that he did not recall defendant telling him. (RT 73-74.) McKay was then shown a transcript of his testimony before the Grand Jury on March 10, 1980, and asked whether that transcript refreshed his memory. (RT 74.) He replied:

> McKAY: I get a recollection in my memory saying that I must have said that. But as I sit here right now, I cannot say that I remember Mr. Patterson or Jim saying this to me at that time. It's been a long time, you know. This is almost two years ago, and I've got to swear under oath right now, and I can't say that I can actually remember him saying that. If I can say that I can go off with that and say --

The following testimony then occurred:

Q: . . . As you sit here today, you can't remember what Mr. Patterson said to you about where he got the forklifts?

A: Right.

Q: But at the time you appeared before the Grand Jury back in March and testified to what he said, at that time apparently you were able to recall; is that correct?

A: Yeah, I was a lot madder at him then.

Q: Well, were you able to recall a little bit better?

A: I must have been.

Q: You say you were mad at him then. Were you lying before the Grand Jury?

A: No, I don't think so.

Counsel for the government then offered the portion of the Grand Jury testimony into evidence. (RT 76.) Upon objection by counsel for defendant, the court asked the witness, "But is

the Grand Jury transcript which you read, is it accurate?" The witness replied, "I believe so." The court then admitted into evidence as past recollection recorded a portion of the Grand Jury transcript in which McKay had testified that the defendant had said that he had gotten the forklifts out of California from a guy he knew down there and that they were "hot". (RT 76-77.)

This evidence of defendant's alleged admission was not properly admitted as recorded recollection under Rule 803(5) of the Federal Rules of Evidence because it was not "shown to have been made . . . when the matter was fresh in [the witness'] memory . . . ." (Rule 803(5), supra.)

The witness, McKay, never testified

that the conversation with Patterson was fresh in his mind when McKay testified before the Grand Jury in March of 1980. Indeed, even on the very different question of whether he was better able to recall the testimony in March of 1980 than at the time of trial, McKay's responses were highly equivocal. He testified that he, McKay, was "a lot madder at" defendant then; that he "must have been" able to recall "a little better" then; and that he did not think he was lying before the Grand Jury. Later in MacKay's trial testimony, McKay explained that he testified before the Grand Jury in the manner that he did because he had heard that Patterson was saying a lot of "bad things" about him and because he had been fired. McKay said that he had exaggerated and

"stretched" his testimony before the Grand Jury by saying things were true when he actually could not remember them to be true. (RT 169, 170, 186, 187.) This testimony falls far short of establishing the foundation requirement of Rule 803(5) that the matter was fresh in the witness' mind at the time of his statement in March of 1980.

Aside from the lack of proper foundation, it affirmatively appears from the record that the alleged admission of defendant could not have been fresh in McKay's mind at the time of his Grand Jury testimony, since that admission occurred sometime in April of 1979, and the Grand Jury testimony occurred in March of 1980. The Grand Jury testimony, thus, was

not made at or near the time of the event or contemporaneously with it, but at least ten months afterwards at a time when the witness, being mad at Patterson, was motivated to fabricate evidence adverse to James Patterson.

The United States Court of Appeals relied on United States v. Senak, 527 F.2d 129 (7th Cir., 1975), cert. denied, 425 U.S. 907, to justify admission of McKay's prior testimony. Petitioner submits that this reliance was misplaced. Although the statement in Senak was made three years after the events it described, the Senak court found "particularly significant" the fact that the witness had gone over the written statement and had made and initialled several deletions and amendments relating to details, which

established that the matters were fresh in her mind when she gave the statement. (Ibid., at 142.) The actual holding of Senak was that under the "unusual circumstances" of that case, including the fact that the statement was not inconsistent with the witness' trial testimony, the introduction of the statement was not reversible error. (Ibid., 139, 142, emphasis added.)

In contrast, the present case does not show any of the factors that motivated the Senak court to declare any error nonprejudicial. McKay's testimony may have shown that his memory was better when testifying to the Grand Jury, but the issue was whether the event was fresh in his mind at before the Grand Jury. This was not established by simply showing that his memory was even worse four and

one-half months later when the trial of the action occurred. Considering all of the pertinent facts and circumstances, it was established that the alleged conversation was at least ten months old when McKay testified before the Grand Jury. The Grand Jury testimony was much closer in time to the trial, when it was established that McKay had no memory of the conversation itself, and McKay never testified that the matter was fresh in his mind and that he could remember details of the conversation at the time of his Grand Jury testimony. The most McKay said was that "apparently" he could recall the conversation before the Grand Jury and that he "must have been" able to recall "a little bit better" than he could at trial. It was also

established that McKay was "a lot madder" at Patterson at the time he testified before the Grand Jury. (RT 74, 75.)

Senak thus does not support the admissibility of this evidence, either leegally or factually. The case for admissibility is much weaker than in Senak, and McKay's Grand Jury testimony should have been excluded.

In addition, the proferred evidence failed to satisfy the other foundational requirement of Rule 803(5), that the statement reflect the witness' prior knowledge correctly. The only evidence which addresses this foundational point is McKay's affirmative answer to the judge's question of whether the Grand Jury transcript which the witness had just

read was accurate. Although the witness said he believed it was accurate, this establishes only the witness' opinion that the transcript is an accurate record of what he said to the Grand Jury. McKay never testified that the Grand Jury testimony was true or accurately reflected Patterson's alleged statement on the job site. Again, any inference that the prior testimony was accurate is undercut by the ten-month lapse between the alleged event and the Grand Jury testimony, and even more so by the witness' admitted bias at the time of his Grand Jury testimony.

In addressing this point, the Court of Appeals rejected as frivolous the argument that McKay said only that the Grand Jury transcript was accurate,

not that his testimony was accurate. (Opinion, page 13, lines 13-20.) This, however, is literally what McKay said. Furthermore, under the circumstances of this case, McKay's trial testimony cannot reasonably be interpreted as confirming the accuracy of his account to the Grand Jury of Patterson's conversation with him. McKay said at trial that he believed the Grand Jury transcript was accurate, but immediately before that testimony he had testified that he could not remember the conversation with Patterson at the time of trial. If he did not remember the conversation with Patterson at trail, then he could hardly be testifying that the Grand Jury transcript accurately reflected the conversation with Patterson. The only possible logical meaning of his trial testimony

is that he did not now remember the conversation, although he believed the transcript accurately reflected what he said to the Grand Jury.

United States v. Edwards, 539 F.2d 689 (9th Cir., 1976), cert. denied, 429 U.S. 984, does not support the government's position. In Edwards, the prior statement of a witness was held properly admitted under Rule 803(5). The statement in Edwards was made the day after the events in question, and contained the witness' handwritten declaration that "I have read this statement of two pages, and it is true and correct to the best of my knowledge." (Edwards, at 694.) Furthermore, in Edwards the witness testified at trial that he believed the statement accurately reflected his recollection

at the time it was made. In this case, McKay's Grand Jury testimony was made ten months after the event, at a time when, being mad at Patterson, he had a motive to fabricate evidence against him. McKay admitted that he had exaggerated and stretched his testimony before the Grand Jury by saying things were true when he actually could not remember them to be true. Unlike Edwards, there was no testimony in this case that McKay's Grand Jury testimony accurately reflected the conversation with Patterson.

Since the Grand Jury testimony was not shown to have been made at a time when the matter was fresh in McKay's memory, nor shown to reflect McKay's knowledge correctly, it was

error to admit it as recorded recollection under Rule 803(5).

Nor was the evidence admissible under Rule 801(d)(1)(A) as a prior statement by a witness, since the prior statement was not "inconsistent with his testimony" at trial. Absent obvious evasion or equivocation which does not appear in the record in the instant case, the testimony of a witness that he does not remember an event is not "inconsistent" with a prior statement by him describing that event. Westinghouse Electric Corp. v. Wray Equipment Corp., 286 F.2d 491, 493 (1st Cir., 1961); People v. Green (1971) 3 Cal.3d 981, 988, 92 Cal.Rptr 494, 479 P.2d 998. McKay's inability to recall any such admission by defendant during the trial in July was not inconsistent with his testimony in

March within the meaning of the case law, and the evidence was thus not admissible under Rule 801(d)(1)(A). Its admission constituted error.

The error was not, as the United States Court of Appeals held, harmless. The court based this conclusion on the fact that F.B.I. agent Olsen had testified, without objection, that McKay had told him of the same conversation with Patterson on or about February 12, 1980. However, it is obvious that any objection at that point to Olsen's testimony would have been futile, in view of the court's previous ruling and the fact that the court had already erroneously admitted McKay's Grand Jury testimony. Moreover, the testimony from Olsen was far different in character from that of

McKay. Olsen may have been discredited for his memory of a hearsay-on-hearsay conversation and the fact that he was a law enforcement officer interested in obtaining a conviction against Patterson.

For these reasons, and because the issue of knowledge was the central and only issue at trial, the admission of McKay's Grand Jury testimony cannot in any way be construed as harmless error in this case.

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CONCLUSION

For the foregoing reasons, petitioner respectfully submits that the writ of certiorari be issued to review the decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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